EARTH POWER ENERGY & MINERALS, INC.

IBLA 93-75 Decided January 19, 1995

Appeal from a decision of the Nevada State Office, Bureau of Land Management, cancelling in part noncompetitive geothermal resources lease. N-54748.

Reversed and remanded.

1. Geothermal Leases: Applications: Description--Geothermal Leases: Cancellation--Geothermal Leases: Description of Land--Geothermal Leases: Noncompetitive Leases

Sec. 12 of the Geothermal Steam Act of 1970 requires that cancellation of a lease issued under the Act must be preceded by 30-days notice of violation to permit the lessee to commence in good faith to cure the violation giving rise to cancellation. In a case where the required notice was not given, corrective action will be taken to provide the lessee the protection provided by the Act.

APPEARANCES: Ronald C. Barr, President, Earth Power Energy & Minerals, Inc., Tulsa, Oklahoma, for Earth Power Energy & Minerals, Inc.

OPINION BY ADMINISTRATIVE JUDGE ARNESS

Earth Power Energy & Minerals, Inc. (Earth), has appealed from an August 31, 1992, decision of the Nevada State Office, Bureau of Land Management (BLM), cancelling part of noncompetitive geothermal resources lease N-54748. On March 10, 1992, BLM issued a 10-year noncompetitive geothermal resources lease to Earth, effective April 1, 1992, for 1,330.91 acres of land in secs. 2, 3, 12, and 13, T. 31 N., R. 59 E., Mount Diablo Meridian, Elko County, Nevada. Relevant to this appeal, the leased land included lots 3 through 8 in sec. 2 and lots 1, 2, 5 through 7, and the SW¼NE¼ and NW¼SE¼ of sec. 3. The lease was issued pursuant to the Geothermal Steam Act of 1970, as amended, 30 U.S.C. §§ 1001-1025 (1988). The August 1992 decision cancelled the lease to the extent that it included 490.91 acres of land in secs. 2 and 3 because Earth had failed to apply for all available land in those sections, as required by 43 CFR 3210.2-1. Earth appealed from that cancellation.

Under 43 CFR 3210.2-1, a noncompetitive geothermal resources lease application is required to describe "all available lands, including reserved geothermal resources, within a surveyed * * * section." Earth violated this regulation when it failed to apply for lot 2 and the SW¼NE¼ of sec. 2, and lots 3 and 4 and the S½NW¼ and SW¼ of sec. 3, which were

available for leasing when Earth made its offer to lease. Responsibility for submitting a lease offer that properly describes the land sought to be leased rests with the offeror. Cf. John T. Bukant, 88 IBLA 51, 53 (1985) (oil and gas lease offer). Availability of land in secs. 2 and 3 was shown on the relevant geothermal plat for the township. Earth admits to some difficulty in reading the plat, having mistakenly taken the symbol "Wdl" (appearing on the plat in lot 2 of sec. 2) to mean a wilderness ("Wdns"), rather than a withdrawal ("Wdl"). See Statement of Reasons at 2; BLM Manual, Section 1275, Appendix 1 at 11 (Rel. 1-1380 (4/13/84)). Also appearing on the plat in connection with the withdrawal is the notation "PL 99-387" referring to the Act of August 23, 1986 (100 Stat. 825), which included lot 2 of sec. 2 in the Humboldt National Forest, reserving it from entry and settlement under the public land laws pursuant to a Proclamation dated May 3, 1906 (34 Stat. 3198). Earth is presumed to have knowledge of this Federal statute and proclamation and consequently to have known that lot 2 of sec. 2 remained available for geothermal resources leasing. See Federal Crop Insurance Corp. v. Merrill, 332 U.S. 380, 384 (1947). Further, Earth does not provide any explanation for the failure to include other available land in secs. 2 and 3 in its lease offer, nor could it. That land was also shown to be available for leasing on the geothermal plat.

While Departmental regulations do not require rejection of a lease offer for failure to comply with 43 CFR 3210.2-1, we find that BLM may reject an offer where the offeror fails to comply with a mandatory requirement of the regulations, and therefore conclude that BLM could properly reject Earth's lease offer for failure to comply with 43 CFR 3210.2-1. See Energy Partners, 21 IBLA 352, 354 (1975), and cases cited therein. Because of this violation, Earth was not the first qualified applicant for a lease and BLM was entitled to cancel the lease. Irvin Wall, 70 IBLA 183, 186, 90 I.D. 3, 5 (1983). Oil and gas leases can be administratively cancelled if issued in violation of Departmental regulations, including those setting minimum acreage requirements. Boesche v. Udall, 373 U.S. 472, 473-74, 485 (1963). This administrative authority derives from the Secretary's general management powers. Id. at 476. Further, section 12 of the Geothermal Steam Act of 1970, 30 U.S.C. § 1011 (1988), authorizes cancellation of a geothermal resources lease "for any violation of the regulations," whether they govern lease issuance or lease management after issuance. (Emphasis added.) See also 43 CFR 3244.3.

Earth alleges on appeal that in some cases BLM has issued leases for less than all available land in a given section. The official record does not, however, support this argument, but shows instead that, at the time the applications referred to were made, the land applied for was all the lands then available for noncompetitive leasing in the sections to which Earth has referred. Earth also refers to competitive lease N-20970 issued to the Union Oil Company of California (Union Oil) effective January 1, 1979, and cancelled January 4, 1983. The lease involved the same land in secs. 2 and 3 currently encompassed by Earth's lease N-54748. It would appear that not all of the land available for leasing in secs. 2 and 3 was

originally leased to Union Oil. However, leasing lands competitively is different from leasing lands over-the-counter. Competitive leasing does not involve submission of applications by those seeking to lease. Rather, BLM publishes notice of a lease sale with respect to those lands that have been determined to be within a known geothermal resources area (KGRA), bids are submitted by interested parties, and a lease is awarded to the highest responsible qualified bidder. See 30 U.S.C. § 1003 (1988); 43 CFR 3220.3, 3220.4, and 3220.5; Ralph L. Phelps, Jr., 97 IBLA 397, 398 (1987). All the land covered by Earth's lease was considered to be part of a KGRA at the time of the September 1978 lease sale which resulted in issuance of lease N-20970. See 41 FR 4050 (Jan. 28, 1976). BLM was required to lease that land by competitive bidding. See 30 U.S.C. § 1003 (1988); 43 CFR 3200.1. But because there is no statutory or regulatory requirement that all available land in a section be leased competitively at the same time, lease N-20970 could properly encompass only a portion of the lands in secs. 2 and 3 that were then part of a designated KGRA.

Earth contends that when the lease was canceled as to secs. 2 and 3, BLM had already determined that the lands in those sections were properly leased to Earth. Reference is made to a December 19, 1991, decision wherein BLM rejected Earth's lease offer for 273.29 acres of land in secs. 10 and 11, T. 31 N., R. 59 E., Mount Diablo Meridian, Elko County, Nevada, because the offer failed to describe all available land in those sections and then stated that the remaining lands (including those in secs. 2 and 3) were "being adjudicated for lease issuance." Language appearing in an earlier decision could not, however, guarantee that a lease would be issued in the future to lands not yet adjudicated for lease, because BLM had discretionary authority not to issue any lease at all to those lands. See 30 U.S.C. § 1002 (1988); 43 CFR 3210.4; Earth Power Corp., 29 IBLA 37, 41 (1977). Until lease issuance, BLM retained the authority to reject Earth's offer to the extent that it failed to describe all available land in secs. 2 and 3. Following lease issuance, cancellation was the proper remedy for violation of the rule requiring all available land in a given section to be leased.

Earth also contends that lease cancellation amounts to a deprivation of property without due process of law and is a taking of private property without payment of just compensation and therefore was doubly violative of the Fifth Amendment to the U.S. Constitution. We know of no case holding that a taking occurs in the case of cancellation of a Federal lease for a pre-lease violation. See Boesche v. Udall, supra. Earth is not, therefore, entitled to receive the fair market value of the cancelled portion of its lease. If, on remand, the Earth lease is finally cancelled as to the land in secs. 2 and 3, the entitlement of Earth to reimbursement is limited, under 43 U.S.C. § 1734(c) (1988), to return of the advance rental paid. Emery Energy, Inc., 90 IBLA 70, 77 (1985). In these cases, appeal to the Board before an alleged impairment of a property right becomes final affords a party all the process to which it is due. Santa Fe Pacific Railroad Co., 90 IBLA 200, 220 (1986). Nonetheless, section 12 of the Geothermal Steam Act of 1970 also affords the lessee an opportunity for a

hearing. This statute insures that Earth shall have the right to request a hearing during the 30-day correction period provided here, should it choose to do so. See 30 U.S.C. § 1011 (1988).

[1] Authority to cancel a lease for violation of Departmental regulations is limited by section 12 so that cancellation can occur only after the lessee has received 30 days notice and an opportunity to correct the violation. George M. Wilkinson, 124 IBLA 171, 175 (1992). During the time allowed the lessee may correct the violation or, if the violation cannot be corrected within 30 days, it may commence corrective action in good faith, provided it thereafter proceeds diligently to complete the correction. See 30 U.S.C. § 1011 (1988); 43 CFR 3244.3. Nonetheless, BLM failed to give Earth the required notice of and opportunity to correct the violation of 43 CFR 3210.2-1. Because the violation consisted of failure to apply for all available lands in secs. 2 and 3, the action needed was to amend the lease offer. That could not be accomplished, however, following issuance of the subject lease. Because the defective offer has now ripened into a lease for less than all of the available land in secs. 2 and 3, a condition exists that is prohibited by 43 CFR 3210.2-1. That situation can be corrected, however.

In a November 23, 1992, memorandum transmitting this case file to the Board, BLM stated that, "in order for [Earth] to amend * * * lease (N-54748), [Earth] must include lands now included in Geothermal Resources Lease Offer N-56182." That offer, which sought lot 2 and the SW¼NE¼ of sec. 2 and lots 3 and 4 and the S½NW¼ and SW¼ of sec. 3, was filed on August 3, 1992, by Energy Minerals, Inc. (Energy). (When Energy's lease offer was submitted, the lands in secs. 2 and 3 included in Earth's lease in violation of 43 CFR 3210.2-1 were not available for leasing to Energy, being then leased to Earth.) Submission of the Energy offer does not, however, foreclose amendment of the Earth lease. Under 30 U.S.C. § 1003 (1988), Energy is entitled, if it is the first qualified applicant, to a lease of the land in secs. 2 and 3 described in its offer. But submission of an offer does not guarantee that a lease will be issued to Energy. It also may have failed to abide by a statutory or regulatory requirement, or its lease offer may otherwise be subject to rejection. In any case, the land remains available for leasing, in spite of the pending offer. Cf. Irvin Wall, supra at 186, 90 I.D. at 5 (oil and gas leasing).

Nor is BLM required to cancel Earth's lease before adjudication of the Energy offer. Cf. Madison Oils, Inc., 62 I.D. 478, 480 (1955) (oil and gas lease offer). Cancellation of oil and gas leases for violation of Departmental regulations is discretionary. 30 U.S.C. § 1011 (1988); 43 CFR 3244.3; W. H. Bird, 72 I.D. 287, 292 (1965). No reason appears why this policy should not also apply to geothermal resources leases. In the present case, we know of no qualified intervening offer for the land in secs. 2 and 3 already leased to Earth. Therefore, BLM may decide not to cancel the lease, notwithstanding the violation of Departmental regulations that occurred prior to lease issuance. To take this approach would

permit BLM to defer cancellation to permit correction of the existing violation. In the present posture of this case, there is no choice now but to do so, because of the notice requirement imposed by section 12 of the Geothermal Steam Act and 43 CFR 3244.3.

Accordingly, Earth must be allowed the opportunity provided by section 12 of the Geothermal Steam Act of 1970 (and implementing regulation 43 CFR 3244.3), to commence in good faith and to proceed diligently to correct the violation of 43 CFR 3210.2-1 by amending its lease to include all of the available land in secs. 2 and 3, including the additional land now encompassed by Energy's offer. In John T. Stewart, III, 25 IBLA 306, 310, 83 I.D. 247, 249 (1976), we found that, as an alternative to cancellation, an oil and gas lessee should (in the absence of an intervening qualified offer filed prior to lease issuance) be allowed to relinquish acreage issued in excess of the maximum permitted by regulation, in order to achieve compliance with that regulation. Similarly, instead of cancellation, Earth should (absent an intervening qualified offer) be allowed to include acreage not issued in conformity to the minimum required by regulation, in order to achieve compliance with that regulation. See Horace H. Alvord IV, 80 IBLA 49, 51-52 (1984) (oil and gas lessee permitted to amend lease to include entire Federal interest). Earth's ability to include the additional land must, however, hinge on whether Energy (or anyone else) has a prior qualified offer for that land.

Earth must therefore be permitted to submit an offer for the additional land in secs. 2 and 3. If it does so, there will then be two outstanding offers to lease that land (assuming no other offers have been filed in the meantime). Priority between the offers will be determined by the date of filing of a complete offer so that Energy's offer will have priority (since Earth's offer can acquire no priority before it is submitted). See 43 CFR 3210.2-2. BLM must first adjudicate Energy's offer, followed by Earth's offer. If Energy's offer is rejected, BLM may then amend Earth's lease to include the additional land in secs. 2 and 3. If the Energy offer is accepted, BLM may cancel Earth's lease as to the land in secs. 2 and 3. The cancelled acreage will then again be available for leasing to any qualified applicant.

Accordingly, we reverse BLM's August 1992 decision and remand the case to BLM so that it may allow Earth 30 days from receipt of notice to commence in good faith to correct the existing violation of 43 CFR 3210.2-1 by amending the lease to include the other available land in secs. 2 and 3. See George M. Wilkinson, supra at 175. If Earth fails to offer an amendment within the 30-day period, BLM may then properly cancel the Earth lease as to the land in secs. 2 and 3. If Earth offers to amend, BLM may then adjudicate Energy's lease offer. If the Energy offer is rejected, BLM may then amend Earth's lease to include the additional land. If the Energy offer is accepted, BLM may then cancel Earth's lease as to the land in secs. 2 and 3. During the time before cancellation or amendment of the subject lease, BLM is directed not to approve any assignments or drilling

permits with respect to the leased land in secs. 2 and 3. See Lawrence H. Merchant, 81 IBLA 360, 364-65 (1984).

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is reversed and the case is remanded to BLM for further action consistent herewith.

Franklin D. Arness
Administrative Judge

I concur:

James L. Byrnes
Chief Administrative Judge